



*Analysts*, 492 U.S. 136, 144-45 (1989). The federal courts have identified four relevant factors to consider in determining whether a document was under an agency's control at the time of a request:

- (1) The intent of the document's creator to retain or relinquish control over the document;
- (2) The ability of the agency to use and dispose of the record as it sees fit;
- (3) The extent to which agency personnel have read or relied upon the record; and
- (4) The degree to which the record was integrated into the agency's record system or files.

See, e.g., *Burka v. Dep't of Health and Human Services*, 87 F.3d 508, 515 (D.C.Cir. 1996); see also *Donald A. Verrill*, Case No. TFA-0364 (2010). Oak Ridge stated that the records were neither in the possession nor control of Oak Ridge at the time of the request. Determination Letter. We learned from Oak Ridge that Battelle is the contracting entity on behalf of the government. The records are owned by Battelle. They are not issued by the federal Government nor a Government Contracting Officer. Battelle does in fact have the records sought that are required of our contractors and subcontractors. It was never Battelle's intention or that of the Watts to relinquish control of the certified payroll records to DOE. DOE has never used, disposed of, read, or relied upon the records. Further, the records are not integrated into DOE's record system or files. E-mail dated June 11, 2014, from Amy Rothrock, FOIA Officer, Oak Ridge, to Janet R. H. Fishman, Attorney-Advisor, OHA, DOE.

The Appellant argues that under the Davis-Bacon Act, 40 U.S.C. § 3141, *et seq.*, the DOE must maintain possession and control of the certified payroll records. Appeal Letter at 2. As the Applicant states in its Appeal, DOE would have a copy of the payroll records if it is a party to the contract. 29 C.F.R. 5.5(a)(3)(ii)(A). However, the contract is between Battelle and Watts Construction, Inc. Although Battelle may have the records, we have been informed affirmatively that these records are not in the possession or control of DOE. Therefore, they are not agency records subject to release under the FOIA.

However, a finding that certain documents are not "agency records" under the FOIA does not end our inquiry. The DOE's FOIA regulations state:

When a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)(2).

10 C.F.R. § 1004.3(e). The Appellant argues that DOE's contract with Battelle describes the requested records as the property of the Government. The Appellant relies on a clause in the contract which states that contractor records include "records relating to any procurement action by the Contractor, except for records that under 48 C.F.R. 970.5232-3 are described as the property of the Government." Appeal Letter at 1. The Appellant continues that under subsections

(c) and (g) of the 48 C.F.R. 970.5232-3, the requested records are the property of the Government. Subsection (c) states:

(c) Audit of subcontractors' records. The Contractor also agrees, with respect to any subcontracts (including fixed-price or unit-price subcontracts or purchase orders) where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor of any tier, to either conduct an audit of the subcontractor's costs or arrange for such an audit to be performed by the cognizant government audit agency through the Contracting Officer.

48 C.F.R. § 970.5232-3(c). Subsection (g) states:

(g) Subcontracts. The Contractor further agrees to require the inclusion of provisions similar to those in paragraphs (a) through (g) and paragraph (h) of this clause in all subcontracts (including fixed-price or unit-price subcontracts or purchase orders) of any tier entered into hereunder where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor.

48 C.F.R. § 970.5232-3(g). Nowhere in either of these subsections does it state that documents are the property of the Government. Subsection (c) states that the contractor can perform the audit. Subsection (g) makes no statement about agency records. Our reading of 48 C.F.R. 970.5232-3 is at odds with the analysis of the Appellant. At no point does the regulation state that these records are the property of the Government.

For the reasons given above, we have determined that the requested records were not agency records. Therefore, we will deny the Appeal.

### **III. Conclusion**

After considering the Appellant's arguments, we are convinced that the requested records are not agency records under the FOIA. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Torres Consulting & Law Group, LLC, Case No. FIA-14-0032, is hereby denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a

non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, MD 20740  
Web: [ogis.archives.gov](http://ogis.archives.gov)  
E-mail: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: 202-741-5770  
Fax: 202-741-5769  
Toll-free: 1-877-684-6448

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: June 16, 2014